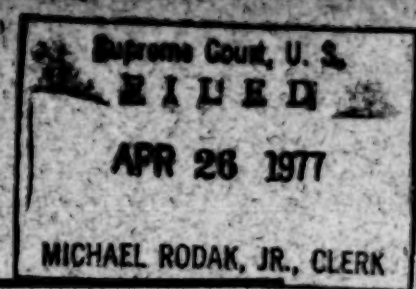


No. 76-1190



In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE FASSNACHT, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**MEMORANDUM FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

WADE H. MCCREE, JR.,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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Petitioners instituted this civil rights suit against both local and federal defendants, charging violations of 42 U.S.C. 1983, 1985, and 1986, in connection with a search of and seizure from petitioners' home.

The search occurred on June 20, 1971.¹ Subsequent to the search, petitioner George Fassnacht was arrested and charged with illegal possession of an arsenal of dangerous weapons and explosives. On October 27, 1972, his pretrial motion to suppress evidence was granted, and the state appellate court affirmed on November 8, 1973. In December 1973, he was acquitted of all criminal

¹The facts are set forth in greater detail in the memorandum orders of the district court (Pet. App. 1a-4a, 11a-12a, 17a-20a).

charges. Petitioners filed this civil action on November 4, 1974, more than three years after the search.

The district court dismissed the complaint with respect to all defendants, holding that the claims were barred by Pennsylvania's two-year statute of limitations applicable to a general trespass (Pet. App. 5a, 13a, 16a).² The court of appeals affirmed (Pet. App. 21a-23a), noting in addition that petitioners had stated no cause of action under the Civil Rights Acts with respect to the federal defendants (Pet. App. 23a).

1. The district court properly dismissed the complaint as to the federal defendants. 42 U.S.C. 1983 only states a cause of action against persons acting under the color of state law. The federal defendants here derived their authority from federal law and accordingly are not liable under Section 1983. *District of Columbia v. Carter*, 409 U.S. 418; *Soldevila v. Secretary of Agriculture*, 512 F. 2d 427, 429 (C.A. 1); *Roots v. Callahan*, 475 F. 2d 751 (C.A. 5). Similarly the federal defendants could not be held liable under 42 U.S.C. 1985. As the court of appeals correctly determined (Pet. App. 23a), petitioners' complaint does not allege facts sufficient to establish a case of invidious class-based discrimination under that statute. See *Griffin v. Breckenridge*, 403 U.S. 88, 102; *Denman v. Leedy*, 479 F. 2d 1097 (C.A. 6). Finally, there can be no federal liability under 42 U.S.C. 1986, for a violation of Section 1985 is a prerequisite to a cause of action under 42 U.S.C. 1986. See *Hamilton v. Chaffin*, 506 F. 2d 904, 914 (C.A. 5); *Dowsey v. Wilkins*, 467 F. 2d 1022, 1026 (C.A. 5); *Hahn v. Sargent*, 388 F. Supp. 445, 450 (D. Mass.), affirmed 523 F. 2d 461, 469-470 (C.A. 1), certiorari denied, 425 U.S. 904; *Johnston v.*

²Federal defendants Berst, Hanlin and Chalupa were dismissed pursuant to a stipulation between the parties (Pet. App. 6a-7a, 16a).

National Broadcasting Co., Inc., 356 F. Supp. 904, 909-910 (E.D. N.Y.).

2. The applicable statute of limitations had run before suit was filed. 42 U.S.C. 1986 contains a one-year statute of limitations. The state statute of limitations for the most similar cause of action is applicable to actions under 42 U.S.C. 1983 and 1985. *O'Sullivan v. Felix*, 233 U.S. 318; *Kaiser v. Cahn*, 510 F. 2d 282, 284-285 (C.A. 2); *Ammlung v. City of Chester*, 494 F. 2d 811, 814 (C.A. 3). The district court reasonably concluded that Pennsylvania's two-year general trespass statute of limitations applied to the most closely analogous state cause of action (Pet. App. 19a).³

The district court did not err in holding that petitioners' action was barred under these limitation statutes (Pet. App. 2a-3a, 19a). The court held that the limitation period began running at the time the state trial court first ordered the seized evidence suppressed (Pet. App. 19a). At least from that date, if not from the date of the actual search, petitioners' cause of action for alleged constitutional violations had accrued. Affirmance of the suppression order was not a prerequisite "to make any civil rights claim of petitioner sueable" (Pet. 8), and there was no basis for suspending the running of the statute past the entry of the suppression order (Pet. App. 3a). See, e.g., *Kaiser v. Cahn*, 510 F. 2d 282, 285 n. 3 (C.A. 2); *Strung v. Anderson*, 452 F. 2d 632 (C.A. 9). The institution of the present suit on

³The district court correctly held that the statute of limitations for the trespass action barred petitioners' claims, all of which related to the allegedly improper search and seizure. See *Ammlung v. City of Chester*, 494 F. 2d 811, 814 (C.A. 3); *Smith v. Cremins*, 308 F. 2d 187, 190 (C.A. 9); *McIver v. Russell*, 264 F. Supp. 22, 27 (D. Md.). In any event, the question whether the district court correctly characterized petitioners' claims for the purpose of applying the appropriate state statute of limitations does not warrant review by this Court. See generally *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706.

November 4, 1974, more than two years after the first suppression order, and three years after the seizure, was barred by the applicable statutes of limitations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.